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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

ALLEN E. ERTEL,

*Petitioner,*

v.

THE PATRIOT-NEWS COMPANY, DICK SARGE and WILLIAM C. COSTOPOULOS,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## BRIEF IN OPPOSITION OF RESPONDENTS THE PATRIOT-NEWS COMPANY AND DICK SARGE

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16 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Where the judgment of the state court below rests on adequate and independent state law ground, may this Court properly exercise jurisdiction pursuant to 28 U.S.C. §1257?

2. Where Petitioner did not properly preserve, and the state court below did not decide, any federal question, may this Court properly exercise jurisdiction pursuant to 28 U.S.C. §1257?

3. Where the ruling of the state court presented for review does not give rise to an important question of federal law, should this Court grant review?

## PARTIES TO THE PROCEEDING

Petitioner Allen E. Ertel was the plaintiff in the Court of Common Pleas of Philadelphia County and was the appellee in the Supreme Court of Pennsylvania, the court whose judgment is sought to be reviewed.

Respondents The Patriot-News Company, Dick Sarge and William C. Costopoulos were defendants in the Court of Common Pleas of Philadelphia County and were appellants in the Supreme Court of Pennsylvania.

The parent company of The Patriot-News Company is Advance Publications, Inc. The following are the subsidiaries (except wholly-owned subsidiaries) of the Patriot-News Company:

Interculture Communications, Inc.
Conde Nast China LLC
Barrie & Jenkins Ltd.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

PARTIES TO THE PROCEEDING ..... ii

OPINION BELOW ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 4

I. THE COURT LACKS JURISDICTION OVER THIS CASE ..... 4

A. Because the Judgment of the State Court Rested on an Adequate and Independent State Law Ground, This Court Should Deny the Petition for Writ of Certiorari ..... 4

B. Ertel Failed to Preserve, and the State Court did not Consider, Ertel's Federal Due Process Argument or his Argument Based on *Milkovich v. Lorain Journal Co.* ..... 5

II. THE QUESTIONS PRESENTED DO NOT MERIT THIS COURT'S ATTENTION ..... 7

A. The Pennsylvania Supreme Court's Ruling did not Address or Concern an Important Question of Federal Law ..... 8

B. The Decision Presented for Review is not in Conflict with Federal Law ..... 9

C. Ertel's Petition Improperly asks this Court to Review the Factual Findings of the Pennsylvania Supreme Court ..... 10

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..2, 10

*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) .....2, 10

*Ertel v. The Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996) ..... 1

*Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919) ..... 6

*Herb v. Pitcairn*, 324 U.S. 117 (1945) ..... 4

*Herndon v. Georgia*, 295 U.S. 441 (1935) ..... 6

*Immuno AG. v. Moore Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, *cert. denied*, 500 U.S. 954 (1991) ..... 9

*Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988) ..... 10

*McCorquodale v. Texas*, 211 U.S. 432 (1908) .....6, 7

*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) ... 6, 7, 9

*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) ..... 10

*Texas v. Mead*, 465 U.S. 1041 (1984) ..... 10

*United States v. Johnston*, 268 U.S. 220 (1925) ..... 10

UNITED STATES CONSTITUTION

U.S. Const. amend. I. ..... 9

U.S. Const. amend. XIV ..... 6

COURT RULES

U.S. Supr. Ct. R. 10 ..... 8

Pa. R.C.P. 1035 .....2, 5

## BRIEF IN OPPOSITION

Respondents The Patriot-News Company and Dick Sarge respectfully pray that the Petition for Writ of Certiorari sought in this matter be denied.

## OPINION BELOW

Petitioner Allen E. Ertel seeks review of the decision that the Supreme Court of Pennsylvania issued in this matter on April 17, 1996. That court's opinion is reported, *see Ertel v. The Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996), and is reprinted in Appendix C to the Petition for Writ of Certiorari.

The Pennsylvania Supreme Court's opinion addressed a single issue: what is the proper application of Pennsylvania Rule of Civil Procedure 1035 in a public figure's defamation action, where newspaper defendants have moved for summary judgment and where the plaintiff has failed to produce any evidence of falsity?

The Pennsylvania Supreme Court held that under Rule 1035 of the Pennsylvania Rules of Civil Procedure, a state court rule of procedure governing summary judgment motions in Pennsylvania state court actions, the moving party is not required to negate elements of the non-moving party's case until the non-moving party introduces evidence supporting the elements of its claims. The Pennsylvania Supreme Court held further that, to survive a summary judgment motion in a civil case pending in a Pennsylvania state court, the non-moving party is required to adduce sufficient evidence on

an issue essential to its case and on which it will bear the burden of proof at trial such that a jury could return a verdict in its favor. In reaching its decision, the Pennsylvania Supreme Court adopted the federal summary judgment standard enunciated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), as the law of Pennsylvania applicable to motions brought pursuant to Pennsylvania Rule of Civil Procedure 1035.

In applying this standard, the Pennsylvania Supreme Court held that Ertel did not offer evidence that any of the allegedly defamatory material was false. As a result, the court held that there was no genuine issue of material fact regarding falsity and entered judgment in favor of respondents, including The Patriot-News Company and Dick Sarge.

## STATEMENT OF THE CASE

Allen E. Ertel initiated this action in 1985 by filing a complaint in the Court of Common Pleas for Philadelphia County against the Patriot-News Company (the "Patriot-News") and its reporter, Dick Sarge, as well as attorney William C. Costopoulos. In his complaint, Ertel alleged that he was defamed by an article which was written by Sarge and published in the *Sunday Patriot-News* on June 30, 1985. The text of the article is reprinted in Appendix B of the petition.

The article reported the findings of an investigation undertaken by Costopoulos, a locally prominent criminal defense attorney, into a high profile murder case that

Ertel had successfully prosecuted while serving as District Attorney of Lycoming County, Pennsylvania. The article explained that Costopoulos had been hired to conduct his investigation by the family of Kim Hubbard, the convicted defendant, and that Costopoulos had concluded that the family's claim "of a strong pattern of prosecutorial manipulation and/or tampering of evidence has significant merit." *See* Appendix B of the petition at 92.

There was no dispute that The Patriot-News article fairly and accurately reported the contents of Costopoulos' report. There was also no dispute that, prior to the publication of the article, the Patriot-News and other area publications had published at least six other articles concerning the same contentions of the Hubbards that were the subject of Costopoulos' report. Nevertheless, Ertel argued that the publication of Costopoulos' findings defamed him.

After a period of discovery, the newspaper defendants and Costopoulos separately moved for summary judgment. On May 10, 1991, the Honorable Abraham J. Gafni of the Court of Common Pleas of Philadelphia County granted defendants' motions and entered judgment in favor of defendants and against plaintiff. The trial court's decision is reprinted in Appendix A of the petition. The trial court held that Ertel had "failed to set forth that he can present evidence sufficient as a matter of law to support a finding of actual malice." *See* Appendix A of the petition at 10.

Ertel then appealed to the Pennsylvania Superior Court. A divided panel of three Superior Court judges

ruled that Ertel had set forth enough evidence as a matter of law to support a finding of "actual malice" and entered an order in which the judgment of the Court of Common Pleas was reversed and remanded for further proceedings. The Superior Court's decision is reprinted in Appendix B of the petition.

The Patriot-News and Sarge sought discretionary review from the Pennsylvania Supreme Court, as did Costopoulos. After granting review, the Pennsylvania Supreme Court, in a unanimous decision, reversed the decision of the Superior Court and entered summary judgment in favor of the defendants.

Ertel filed an application for reargument with the Pennsylvania Supreme Court, which was denied without opinion.

## ARGUMENT

### I. THE COURT LACKS JURISDICTION OVER THIS CASE

#### A. Because the Judgment of the State Court Rested on an Adequate and Independent State Law Ground, This Court Should Deny the Petition for Writ of Certiorari.

It is well settled that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The Court's "only power over state judgments is to correct them to the extent they incorrectly adjudged federal rights and [the Court's] power is to correct wrong judgments, not to revise opinions." *Id.* at 125-126.

In this case, the Pennsylvania Supreme Court's decision unquestionably rests on an adequate and independent state law ground. The Pennsylvania Supreme Court held that respondents were entitled to summary judgment based solely on its interpretation of Rule 1035(d) of the Pennsylvania Rules of Civil Procedure.

Moreover, the state supreme court explicitly declined to address the federal arguments put forth by the Patriot-News and Sarge, stating: "Because we have determined that the Superior Court's holding was in violation of Pa.R.C.P. No. 1035, we need not determine whether it was also unconstitutional." *See* Appendix C of the petition at 16, n. 5.

Accordingly, this Court lacks jurisdiction pursuant to 28 U.S.C. §1257 to review the judgment of the Pennsylvania Supreme Court and should deny the petition.

**B. Ertel Failed to Preserve, and the State Court did not Consider, Ertel's Federal Due Process Argument or his Argument Based on *Milkovich v. Lorain Journal Co.***

Ertel failed to preserve in the state courts of Pennsylvania the arguments grounded in federal law purportedly presented in his petition. This Court thus lacks jurisdiction pursuant to 28 U.S.C. §1257 to review the judgment of the Pennsylvania Supreme Court for this reason as well.

Ertel argues in his petition that the entry of summary judgment in favor of respondents and against him constituted a denial of his right to due process of law under the

Fourteenth Amendment to the United States Constitution and evaded the holding of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Ertel did not raise either of these arguments in state court until he filed his application for reargument in the Pennsylvania Supreme Court.

Having raised these arguments grounded in federal law for the first time in his application for reargument, Ertel clearly raised them too late to have been preserved for this Court's review. In *Herndon v. Georgia*, 295 U.S. 441, 443 (1935), this Court stated that "[t]he long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Similarly, in *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919), this Court held:

> The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; *and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point.*

*Id.* at 181 (emphasis added).

And, in *McCorquodale v. Texas*, 211 U.S. 432 (1908), this Court emphasized:

> This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. It is true that we have

> also decided that if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than the denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion.

*Id.* at 437 (citations omitted). Accordingly, this Court in *McCorquodale* dismissed the writ of error due to the failure of the plaintiff in error properly to preserve a federal question for this Court's review.

Here, Ertel is in the same position as the plaintiff in error in *McCorquodale*. It cannot be concluded from the Supreme Court of Pennsylvania's denial of Ertel's application for reargument that the court passed upon the merits of Ertel's federal law contentions raised for the first time in that application.

In light of the decisions cited above, this Court should deny Ertel's Petition. It is clear that Ertel has failed to preserve for this Court's review the questions presented in his petition for writ of certiorari.

## II. THE QUESTIONS PRESENTED DO NOT MERIT THIS COURT'S ATTENTION

Even if Ertel had preserved his federal due process and *Milkovich* arguments by timely asserting these points, this case still would not be appropriate for review on writ of certiorari.

### A. The Pennsylvania Supreme Court's Ruling did not Address or Concern an Important Question of Federal Law.

As set forth in this Court's Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Such reasons may be found to exist where a state court's ruling creates or perpetuates a split of authority regarding a matter of federal law or where a case gives rise to a federal question of overriding importance.

The decision from which Ertel seeks review does not qualify under these criteria. The ruling of the Pennsylvania Supreme Court does not create or perpetuate any conflict of authority regarding a matter of federal law. Furthermore, while the Pennsylvania Supreme Court's ruling as to a matter of Pennsylvania law is of importance to Ertel, the ruling does not give rise to any federal question of overriding importance.

Ertel's petition seeks review of the Pennsylvania Supreme Court's ruling construing and applying Pennsylvania's Rule of Civil Procedure governing consideration of motions for summary judgment. In his petition, Ertel tries desperately to make a federal case out of a Pennsylvania state court's ruling on its own procedural rules. No amount of effort, however, can make this case worthy of review by this Court.

Therefore, this Court should deny Ertel's petition.

**B. The Decision Presented for Review is not in Conflict with Federal Law.**

Ertel's contention that the ruling of the Pennsylvania Supreme Court evades the federal law established in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1989), is without merit.

*Milkovich* in no way precludes a court from entering summary judgment in a public figure's defamation action against a newspaper where the court determines that the plaintiff has not proffered any evidence of falsity. Rather, in *Milkovich* this Court held that it was not persuaded that "an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Id.* at 21. The Court explained that "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Id.* Thus, although *Milkovich* held that a statement of opinion could imply a false assertion of fact, it does not follow that summary judgment is precluded as a matter of law in every situation in which a plaintiff avers that an article contains defamatory implications.[1]

Accordingly, the Pennsylvania Supreme Court's decision is not in conflict with *Milkovich*. Rather, the decision is entirely consistent with *Milkovich* and other federal

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[1] Moreover, it is beyond question that states may give more protection to statements of opinion *under state law* than the minimum required by the federal constitution. *See, e.g., Immuno AG. v. Moòre Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1278, *cert. denied*, 500 U.S. 954 (1991).

precedents. In holding that a non-moving party was required to adduce sufficient evidence on an issue on which it bears the burden of proof to survive summary judgment, the Pennsylvania Supreme Court explicitly adopted the rulings of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 244 (1986).

Moreover, the Pennsylvania Supreme Court's ruling is consistent with and indeed flows from this Court's ruling in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which established that a plaintiff has the burden of proving falsity in a case involving a media defendant. This burden is applicable at the summary judgment stage. *See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988).

### C. Ertel's Petition Improperly Asks This Court to Review State Court Factual Findings.

It is clear that Ertel is, in actuality, asking this Court to re-examine the factual record of this case and revisit the Supreme Court of Pennsylvania's conclusion that Ertel failed to produce sufficient facts demonstrating that the article in question was false. This Court has repeatedly held that it does not grant certiorari when review is sought of a decision which turns solely upon an analysis of the particular facts involved. *See United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *see also* United States Supreme Court Rule 10 ("[A] Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . . ").

This Court should not grant Ertel's petition merely to revisit the Pennsylvania Supreme Court's determination that Ertel failed to produce sufficient evidence of falsity.

## CONCLUSION

For the foregoing reasons, this Court should deny Ertel's Petition for Writ of Certiorari.

Respectfully submitted,

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